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Indian-Federal Regulations from the Inside Out: A Comment on Perry Dane's Meditation

Monroe E. Price
Benjamin N. Cardozo School of Law, price@yu.edu

INDIAN-FEDERAL REGULATIONS FROM THE INSIDE OUT: A COMMENT ON PERRY DANE'S MEDITATION

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There is something in Perry Dane's *Meditation*[1] that is evocative of the mood of Nova Scotia with its seeming embrace of disparate, accumulated cultures. In that place, vestiges of French Acadian culture are compelling, the wistful notes of Longfellow's "Evangeline" in the air. At the same time, in Cape Breton, remnants of the Scottish migration are close upon the scene, and Highlander games mark the occasion for the nurturing of traditions and language. With its fractured roadside restaurant, featuring faceless, styleless food, the Micmac Reservation is a collected symbol of the ongoing relationship between Canada, its Provinces and the Indian people.

This corner of Canada, like other corners of North America, captures that "dance of recognition" that Professor Dane discusses;[2] here are cultures determining how and whether to ennoble the sovereignty of the nation that, on the surface, ennobles the sovereignty of cultures within it. In the summer of 1989, Canada agreed to an historic arrangement in which Indian tribes would seem to have far more autonomy, far more control in the great Northern regions than had been acknowledged in recent times.[3] Even the extraordinarily complex conversation between Quebec and Canada over language and power is part of this lurching, a lurching that is best when it is about mutual respect, based sometimes on culture, sometimes on religion, sometimes on other differences.

Nova Scotia is a gentle place, not so constantly rocked by the pressures of settlement, of industrialization, of harsh power, as is the United States. Perhaps this is due to a tradition, among its people, of being conquered, rather than conquering and winning. Monuments there are confused in their connotation because they often stand for a temporary dominance. A consequence of this turbulent history is that there is a tone of accommodation—an effort to comprehend, to give room and autonomy to what Professor Dane calls non-state legal

* Dean and Professor of Law, Benjamin N. Cardozo School of Law.

1 Dane, The Maps of Sovereignty: A Meditation, 12 Cardozo L. Rev. 959 (1991).

2 Id. at 964.

3 See N.Y. Times, Aug. 21, 1989, at A3, col. 1.

orders.[4]

Dane's ennobling sovereignty—the relationship between the state and non-state legal orders—has the stunning virtue of the ideal. He writes poetically of power. That is an enterprise of high risk, for the beauty of his words may be a camouflage, knowing or not, for the ugliness below. Poetry may mask power rather than explain it. For Dane, the confrontation between the non-state legal order (I will focus on Indian tribes in the United States) and the state is an existential experience, a group hug in the night, a dance of recognition.[5] Dane seems to be arguing that sovereignty is an ephemeral, dense combination of history and land and divinity and world-views, that perhaps, only poetry can capture. He apparently rejects the lame explanations dependent on rights-talk or liberal positivism or other comprehensive visions of the world order.[6]

Perhaps he is right. When I was first writing about the legal problems of Native Americans, the assertion of sovereignty was always puzzling to me. Was there a sovereign that did not have to answer to another, and that did not have to take into account the potential force of a neighbor, an overarching hegemony, or a distant imperial throne? Too often, the assumption was that something called sovereignty existed in an absolute (as opposed to relational) form; but belief in absolute sovereignty, what Dane calls "state exclusivism,"[7] carries the seed of tragic failure. It invites force or it asserts force. If all sovereignty is relational, a product of the mix between belief and fact, between circumstances and aspiration, between exercise and hope, most importantly between entity and entity, then metaphor is a more suitable means of describing it than the language of law.

Metaphor is often a surprisingly suitable means of description. A painting, even an abstract painting, may have more truth in it than a photograph. A poem may be more telling than a dry accumulation of facts. So Dane may be right, persuasively right. Even though I question his version of the historical antecedents that provoke his vision, it could be argued (to use the cautious phrasing of a law professor) that the least interesting question about Professor Dane's paper is whether his account of the relationship between American Indians and the United States (including the European settlers and the states)[8] is an

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[4] Dane, supra note 1, at 965.

[5] Id. at 970-71.

[6] Id. at 971-72.

[7] Id. at 973-87.

[8] Id. at 962.

accurate one. After all, Professor Dane is exploring legal consciousness. He is inspiring a morally and ethically superior way of looking at the relationship among groups. To say that his account of the history of the Native American-European settler is inaccurate could be perceived, ultimately to be a statement that the steady search for collective dignity in a pluralistic society is a futile endeavor. That is certainly not my intent.

But the otherwise dispensible question of experience becomes vital when Professor Dane begins to ask how and why the parties socially constructed their relationship in particular ways.[9] History and experience tell us how and when notions of sovereignty arose. It matters why the various participants chose certain words and concepts to describe the relationship between the settlers and the aboriginal people. It matters how the language of the Europeans changed, what it was in the seventeenth and eighteenth century, how it came to have Justice Marshall's refinements.[10] It matters how the various Native groups themselves evolved words and theories to describe their relationship to the flood of "civilization" that moved across the land.[11]

Dane's paper has been written for a conference on religion and pluralism, devoted especially to the way in which a religion defines itself in relation to an external state, or some dominant other. He looks at the history of the Native experience as an analogue to this relationship, but it is more than that. It was often religion itself that yielded the words, the consciousness, the guilt, the justification, the definition of the relationship of Native Americans to the European imperial and settler communities.[12] God's will could provide the cruel warrant for power. In the most recent times, religion has been viewed as a house of tolerance and pluralism, but it was not always so. One might say, without being too inaccurate, that the assertions of sovereignty, of quasi-nationhood were intensified as a reaction by the indigenous people to those religious tendencies of the settler culture hostile to the fundamental differences that the residual Nations represented.

For Professor Dane, the seventeenth century marked a time when at least some Native people perceived the Europeans as just another tribe; and, perhaps, in that early period of fear and hope, Euro-

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9 Id. at 973-98.

10 See Dane's discussion of Marshall's Cherokee opinions, id. at 987-91.

11 See, e.g., B. Whorf, Language, Thought, and Reality 57-58 (1964) (discussion of the relationship of Hopi language to their world view).

12 Eisinger, The Puritan's Justification for Taking the Land, in 84 Essex Institute Historical Collections 131 (1948), relevant excerpt reprinted in M. Price, Law and the American Indian 367 (1973).

pean settlers had equivalent respect for the groups they found here. But almost from the beginning there was a strong, destructive dynamic that affected the relationship. The Puritans had a phrase that justified their taking of land—that it was *vacuum domicilum*.[13] Roger Williams may have written of the "*sinne* of the *Pattents*, wherein *Christian Kings* (so called) are invested with Right by virtue of their Christianitie, to take and give away the Lands and Countries of other Men . . . ."[14] But his was an eccentric view. As Governor John Winthrop wrote him in 1633, with the kind of brute logic that has supported power for three centuries since: "If we had no right to his lande, yet our God hathe right to it, & if he be pleased to give it us. . .who shall control him or his terms?"[15] Almost from the beginning there was conflict, and the rumor of massacre. From the beginning, a theme of European thought was to deny the humanity, much less the nationhood, of aboriginal people.

It is ironic, but deeply true, I think, that it was justification of property title that controlled much of seventeenth century thinking that defined the relationship between Indian and white settler. The doctrine of "discovery," after all, was really an understanding among European powers as to which of the then superpowers had the exclusive right to bargain with the indigenous people for property rights. The history of treaties is more accurately explained as a means of wresting control of lands from Native people, and providing good title to settlers, than as a sign of mutual respect. Much of the history of the eighteenth and nineteenth century is a search for an orderly means of dispossession, one that would be effective, and would minimize conflict, and, perhaps, would appear dignified to other empires settling remote lands. The Indian Non-Intercourse Act of 1790,[16] which forbade further negotiation and treaty-making between states and tribes, as opposed to negotiation between federal governments and tribes, was consistent with this interpretation. Agreements between states and tribes were too unstable, too likely to yield conflict, too productive of future struggles over succession. And to make binding agreements, authorities with recognized power were needed. A jurisprudence of contracting power required, if treaties were the necessary tool for quieting title, a legal order that would give those treaties facial legitimacy. To have treaties, leaders were needed to sign

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[13] Id.

[14] Id. at 368.

[15] Id. at 370.

[16] Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138.

them. To have leaders with authority to sign them, some legitimation of their authority was necessary.

The great Indian opinions of Justice Marshall, not only the Cherokee cases,[17] but Johnson v. McIntosh,[18] can be explained on these grounds. Beneath Marshall's rhetoric of deference, beneath words of respect for Indian nations, was a commitment to his view of the proper federalism in the new republic.[19] It would fall to the federal government, not the states, to deal with Indians, to set the ground rules for change. This was an important power. And the lesson to be drawn is not necessarily the historic characterization of Indian power, but the impact that it would have on the states.

By 1871, a shift in power among federal institutions yielded a change in procedures for obtaining title to land. Congress determined then that no further treaties should be entered into.[20] Perhaps the charade of treaty-making had dissolved in the controversy over the virtual unilateral modification of treaties, or perhaps the world community no longer required the mythos of treaties to justify colonial advances. Closer to home, there was a battle for authority over Indian lands between the House of Representatives and the Senate. The Constitution gives the advice and consent power over treaties to the Senate; and if these were actually treaties, then the law-making process would limit the role of the House. Now, with the abandonment of treaties, it would be the House and its key committees that could help govern the pace of change in the status of Indian lands. Thus, by the end of the century, the idea of Treaty, with its collection of ideas about Indian nations, was peremptorily annulled in an amendment to an appropriations bill.[21]

The twentieth century has seen a rebirth of the idea of tribal authority, often for the purpose of confirming or facilitating control of reservation resources by outsiders. A close examination of Navajo history, for example, demonstrates that the modern tribe was brought into being to permit the signing of oil leases in the 1920's. It was contracts, not Treaties, that needed to be signed; the clarification of leaders was needed to satisfy banks and mining companies that wished to have assurance before they made their investments. Law-

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17 See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); see also Dane, supra note 1, at 987-91 (discussion of these cases).

18 21 U.S. (8 Wheat.) 543 (1823).

19 See John Marshall's Defense of "McCulloch v. Maryland" (G. Gunther ed. 1969) (discussion of Marshall's view of Federalism).

20 F. Cohen, Handbook of Federal Indian Law 62 (1982 ed.).

21 Id. at 106. See Act of March 3, 1871, 16 Stat. 544, 566, now section 2079 of the Revised Statutes.

yers and accountants had to be satisfied that there was a sustainable chain of authority supporting the name on the bottom of a contract.

So sovereignty and ideas of nationhood may be a hallmark for pluralism, but its history falls against a complex and unhappy background. Notions of "inherent sovereignty," independent of Congressional mandate, are central to the respectful interplay that Professor Dane so values. If all power of the non-state legal order arises from the state itself, and the state has the power to destroy as well as create, that is a significant aspect of the "dance of recognition." For Dane's poetry to have force, he must criticize a dominating society that is only alert to the sovereignty of tribes as "validation by permission."[22] A cynic may argue that self determination, as well as other emblems of sovereignty, are ennobled primarily for the purpose of passage of title.

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We are now coming to a time, interestingly, when it is religious assertions—appeals to immunity based on belief, not power—that often provide the basis for protecting non-state legal orders, in Dane's phrase, from state and federal intervention. As an example, in 1978, Congress enacted the American Indian Religious Freedom Act,[23] something of an irony and something of an illusion. But for our purposes here, it turns out that the assertion of a religious organic whole may be an important tool in achieving Professor Dane's goals of a more harmonious relationship between the state and the non-state legal order.

One may ask what has happened in the last two hundred years, to the ideological tenets and functions of religion, to change it from a reason for dispossession to a reason for protection of Indian culture. I have mentioned the role that Puritan ideology, including religious faith, played in the defining of Indians as a legal order. There is a curious way in which Indian policy was involved, in the late nineteenth century, with general attitudes toward pluralism and religions. During the Peace Policy, following the Civil War, the reservations of the West were allocated among major religious groups with each church assigned funds to engage in the civilizing process.[24] Rather than have the federal government take on the task, or the tribe itself, the churches received federally appropriated funds to convert and civilize their charges. As the European religions held sway, prohibi-

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22 See Dane, supra note 1, at 970.

23 Pub. L. No. 95-341, 92 Stat. 469 (1978), 42 U.S.C. § 1996 (1981).

24 See generally F. Prucha, American Indian Policy in the Formative Years: The Indian Trade & Intercourse Acts 1790-1834 (1974).

tions on Native American religious practices were tightened. The dominance that yielded diminished reservation cultures was mirrored in the dominance of the settler religions. They had validity. Native religions did not.

It is an interesting part of the dance of recognition that this attitude toward religion has been reversed. In recent decades, Native cemeteries have become protected ground. Adoptions are regulated federally. Museums turn remains back to Indian people for proper respect and care. Arguments are made for the protection, on religious grounds, of mountain peaks in Arizona, lands in New York, waters in New Mexico. What accounts for this change? Is this a new tolerance, or merely the imputation of the changing ideals of the dominant society to Native people? Or is the majority more tolerant because it is less fearful, because it considers its battle all but won? Or maybe, and this is closer, perhaps, to Professor Dane's point, the majority culture is seeking, in the Native experience, a religious faith it yearns for itself. All of a sudden, as Natives are less and less a threat, they are ennobled. We impute to them a religious fervor which we lack. We celebrate among them a fighting for religious values for which, perhaps, we yearn.

The buttressing of Native religious freedom has a utility to the mainstream, just as sovereignty and nationhood has had. It rationalizes a basis for distinction. The reservation, Judge Deady said in United States v. Clapox,[25] is in the nature of a classroom; it is there for instruction in civilization.[26] The dominant society, as instructor, may have changed its own notion of what is therapeutic. There is less faith in the termination approach of the fifties, with its urbanization and anomie. Perhaps, this shift marks a sense that Native religions must play a larger role in the long term civilizing strategy. So these religions are now permitted to continue where, before, they were forbidden.

Much of the Cardozo conference on religious law and legal pluralism has been, in Professor Dane's terms, about looking at secular law from the inside out. It has been a matter of reviewing the relationship between the Mormons and the federal government from the Mormon perspective, looking at the power of the state to punish from the Jewish perspective, looking at the powers of the English courts from a canonical stance. Professor Dane has moved, in his essay, toward a comprehensive theoretical approach for this process, and for that he deserves our gratitude. I have tried to use this opportunity to

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[25] 35 F. 575 (D. Ore. 1888).

[26] Id. at 577.

comment on his paper from the outside in, not to question his theoretical approach itself, but to express caution as to the way his approach fits the relationship among the communities that have fought for space and time across the American plain.